by the out-of-state manufacturers, and that Petitioner bought from these out-of-state manufacturers the Accounts Receivable thus generated. The Supreme Court of Illinois (Op., App. B, p. 6a) has seized upon the suggestion of the Respondent that Petitioner, having solicited the orders as a limited agent for the out-of-state manufacturers, "went a step further—in all of these transactions, plaintiff purchased the Account Receivable from the out-of-state manufacturer or supplier, without recourse." (Op. App. B, p. 6a). This establishes the fact that Petitioner did not make these sales.

Prior to 1946, Petitioner had bought machine tools from these out-of-state manufacturers and had resold them to Illinois customers. In the year 1946, competition forced the out-of-state manufacturers to change their method of sales in Illinois, in order to avoid the incidence of the Illinois Retailers' Occupation Tax and to thus enable them to compete with out-of-state sellers into Illinois.[3]

In 1946 Petitioner obtained a ruling from the Respondent Department of Revenue[4] which held that where Petitioner acted as a limited agent only to solicit orders, which were accepted by out-of-state manufacturers, and the goods were then shipped directly by the out-of-state manufacturer to their Illinois customers, f.o.b. out-of-state point of shipment, and Petitioner then purchased the Account Receivable thus generated by that sale, these transactions amounted to interstate sales which were exempt from the Retailers' Occupation Tax, both under the provisions of Section 2 of the Act and under the Commerce Clause of the Constitution of the United States. Neither the Respondent Department of Revenu

[3] Abst. 59, 191.

[4] Exhibit A p. 17a attached to Complaint, App. D.

nor the Illinois Supreme Court has explained how the Petitioner as the purchaser of an Account Receivable can be the seller of the goods which give rise to that Account Receivable.

From 1946 to 1951, no attempt was made to assess this tax against Petitioner. In 1951 Petitioner received a letter from the Respondent Department of Revenue advising that they would in the future reserve the right, by audit, to determine whether Petitioner was following the procedure outlined in the 1946 ruling. If Petitioner was, it would not be subject to the tax; if it was not, it might or might not be subject to the tax.[3]

The Record shows, and the Department does not dispute, that Petitioner thereafter continued to follow the method of doing business outlined in such 1946 ruling, and did not vary from it during the period covered by the audit in question.

The Supreme Court of Illinois (Op., App. B, pp. 5a, 6a) has, in effect, held that Petitioner, having bought machine tools from out-of-state manufacturers prior to 1946, which it resold to Illinois customers, is somehow prohibited by the Department of Revenue, or the Retailers' Occupation Tax Act, or the Illinois courts, from changing this method of doing business, and that it cannot, as a matter of law, abandon this business practice and thereafter represent out-of-state manufacturers only as a limited agent to solicit orders—that it must, in effect, continue to pay the State Tax on sales it does not make.

Petitioner claims that, by soliciting these orders for out-of-state manufacturers who made the sale, (1) it was not the seller of and did not receive or pass title to these articles, (2) that the Supreme Court of Illinois has

[3] Exhibit B attached to Complaint, App. D, p. 22a.

refused to recognize the exemption of *Interstate* sales from this tax, (3) that Petitioner was not, as the limited agent of the out-of-state seller, liable for the tax in any event; and (4) that there is no basis for the holding of the Illinois Supreme Court that "Plaintiff (Petitioner) was engaged in selling at retail within this State, and the sales by plaintiff to Illinois users were not interstate transactions." (Op., App. B, p. 7a).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Illinois Supreme Court sanctions the levy by the State of Illinois of a direct tax against interstate commerce.

The Respondent Department of Revenue, and the Illinois Supreme Court in its Opinion, concede that Petitioner, having acted as a limited agent only to solicit orders for out-of-state manufacturers, "went a step further—in all of these transactions, plaintiff (Petitioner) purchased the Account Receivable from the out-of-state manufacturer or supplier." (Op., App. B, p. 6a).

This is an acknowledgment that the out-of-state manufacturer, and not the Petitioner, made these sales to their Illinois customers—an interstate sale, in which the Illinois customers' orders were accepted by the factories at their out-of-state places of business, where the goods were fabricated, and from which they were shipped to these factories' Illinois customers, f.o.b. out-of-state point of shipment.

The Illinois Retailers' Occupation Tax is a tax on the privilege of selling tangible personal property at retail *within the State of Illinois.*[6] It is measured by gross re-

[6] App. A., p. 1a, Sec. 2, Illinois Retailers' Occupation Tax Act, Chapter 120, Sec. 441, Illinois Revised Statutes.

ceipts from sales[7]—in this case, if the Opinion stands, by gross receipts from interstate sales.

The levy of this tax against these interstate sales is prohibited by the *specific exemption of such sales* from this tax in Section 2 of the Retailers' Occupation Tax Act itself.[8]

The levy of this tax against these interstate sales is also prohibited by the Commerce Clause of the Constitution of the United States, Article I, Section 8. This Court has stated this precept in a case involving the same statute,[9] where you have observed that "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office (out-of-state) for acceptance, filling and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller." You quoted with approval the Illinois Supreme Court's own observation in this respect.[10]

The Record is undisputed that in this case, unlike the *Norton* case, *supra*, no one in the State of Illinois had any authority to accept orders for these out-of-state manu-

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[7] App. A., p. 1a, Sec. 2, Illinois Retailers' Occupation Tax Act, Chapter 120, Section 441, Illinois Revised Statutes.

[8] App. A., p. 1a, Sec. 2, Illinois Retailers' Occupation Tax Act, Chapter 120, Section 441, Illinois Revised Statues.

[9] **Norton Co. v. Department of Revenue of the State of Illinois**, 340 U. S. 534 (537), 95 L. Ed. 519 (520).

[10] ". . . there could be no tax on the solicitation of orders only in the State." **Norton Co. v. Department of Revenue of the State of Illinois**, 340 U. S. 534 (536, 537), where this Court quoted with approval this language from the same case in the Illinois Supreme Court, 405 Ill. 314, 320, 90 N. E. 2d 737, 741.

facturers (Abst. 59, 61, 63, 64, 65, 66, 69, 189, 190, 197, 211, 224, 231, 232 and 247). The sales on which Respondent seeks to levy a tax against Petitioner are sales made by out-of-state manufacturers for whom Petitioner acted only as exclusive limited agent to solicit orders (Abst. 69, 70). No question arose, or is here involved, as to sales made by Petitioner for other out-of-state factories for whom Petitioner did not act as such exclusive limited agent—on those sales, Petitioner bought and resold, and paid the tax (Abst. 69, 70).

It is respectfully submitted that Petition for Certiorari should be granted, because the State of Illinois has levied a local Retailers' Occupation Tax against interstate sales, and has thereby imposed a burden upon interstate commerce which is prohibited by Article I, Section 8 of the Constitution of the United States.[11] The levy of such tax is also prohibited by Section 2 of the local tax statute itself.[12]

The Illinois Supreme Court in its Opinion in this case states this established rule of law, and cites its own decisions to that effect: "The mere solicitation of orders only in this State has been found not to subject the seller to the Retailers' Occupation Tax, where the seller is an out-of-state resident and the goods are shipped from out-of-state. There the interstate commerce clause applies to bar the application of the tax."[13] Yet by some inexplicable feat of judicial legerdemain, the Illinois Court went on to hold in its Opinion that Petitioner was liable for this local tax because Petitioner "went a step further—in all of these transactions, plaintiff (Peti-

[11] App. A, p. 1a.
[12] App. A, p. 2a.
[13] Op., App. B, p. 6a.

tioner) purchased the Account Receivable from the out-of-state manufacturer, or supplier, without recourse."[14]

Obviously, at that point the sale had been made, by the out-of-state manufacturer, who owned the Account Receivable generated by the sale it had made. It simply does not follow that Petitioner, by purchasing the Account Receivable for a sale already made, has by so doing gone back in time and made the sale. Petitioner could not by any standard be liable for the tax on the sale made by another—in this case by an interstate seller against whom the tax does not apply in any event.

2. The decision of the Illinois Supreme Court has sanctioned the levy of this local State Tax against a person who did not even make the sale. This deprives Petitioner of its property without due process, and denies it the equal protection of the laws.[15]

If the Opinion is let stand, the State could levy the tax against you, or me. True, you or I did not make these sales—but neither did the Petitioner.

The taxing statute itself[16] imposes the tax only "upon persons engaged in the business of *selling tangible personal property at retail in this State*" at a specified percentage "*of the gross receipts from such sales.*"

Petitioner has demonstrated above that it did not make the sales upon which Respondent insists on charging Petitioner. To repeat, almost *ad nauseam*, (1) as shown, *supra*, soliciting the order does not create liability

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[14] Op., App. B, p. 6a.

[15] App. A, p. 1a, Section 1, Amendment XIV, United States Constitution.

[16] Sec. 2, Illinois Retailers' Occupation Tax, Chapter 120, Section 441, Illinois Revised Statutes, App. A, pp. 1a, 2a.

on Petitioner for this tax; (2) as shown, *supra*, Petitioner's purchase of the Account Receivable generated by the interstate sale, *after the sale was made* by the out-of-state manufacturer, The Illinois Supreme Court, by combining these two circumstances, cannot thereby justify the conclusion reached in its Opinion that "Plaintiff (Petitioner) was engaged in selling at retail within this State, and the sales *by plaintiff* (Petitioner) to Illinois users were not interstate transactions."[17]

In addition, the "sale at retail" subject to this tax is a specifically defined term.[18] "'Sale at retail' means any *transfer of the ownership of, or title to,* tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

The Record is, and Respondent does not dispute, and the Illinois Supreme Court does not otherwise hold, that Petitioner did not acquire title to the goods involved in these transactions, and did not "transfer the ownership of, or title to" such goods to Illinois customers (Abst. 63, 187-189; 200-210). Title was conveyed by the manufacturer who accepted the order and made the sale directly to its Illinois customer.

Petitioner, therefore, made no "Sale at retail" under this tax statute.

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[17] Op., App. B, p. 7a, 18 Ill. 2d 496 (502).

[18] App. A, p. 1a, Section 1, Illinois Retailers' Occupation Tax Act, Section 440, Chapter 120, Illinois Revised Statutes.

CONCLUSION.

It is respectfully submitted that the danger involved in permitting a final opinion of a State Court to stand, which gives judicial sanction to the levy of a direct, local State tax against interstate sales, and which further sanctions such a levy against a person who did not make those sales, is to judicially legislate the repeal of the Commerce Clause and of the constitutional guaranties provided to Petitioner and all citizens of the United States by Section 1 of the Fourteenth Amendment to the United States Constitution. A State may not impose a direct tax upon interstate commerce, and may not deprive any person of its property without due process, or of the equal protection of the laws. To permit a State to tax the Petitioner on interstate sales it did not make, does all of these things—and the next time it could be done to you or me.

For these reasons, it is respectfully urged that Petition for Writ of Certiorari be granted.

FRED W. POTTER
EDWARD P. MORSE
38 S. Dearborn Street
Chicago 3, Illinois

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38 South Dearborn Street
Chicago 3, Illinois

APPENDIX A.

Article 1, Section 8. The Congress shall have power

* * *;

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

Section 1, *Amendment* XIV, *Constitution of the United States*:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chapter 120, *Illinois Revised Statutes, Section* 440 (*Section* 1, *Illinois Retailers' Occupation Tax Act*):

> "'Sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales."

Chapter 120, *Illinois Revised Statutes, Section* 441 (*Section* 2, *Illinois Retailers' Occupation Tax Act*):

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent

(3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. . . . However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State."

APPENDIX B.

OPINION

SUPREME COURT OF ILLINOIS

Be It Remembered, that afterwards, to-wit, on the 22nd day of January, 1960, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

MARSHALL & HUSCHART MACHINERY CO., an Illinois corporation, Appellant vs. DEPARTMENT OF REVENUE, STATE OF ILLINOIS, Appellee.	Appeal from Circuit Court Cook County
No. 35413	

Docket No. 35413—Agenda 34—November, 1959.

Marshall & Haschart Machinery Co., Appellant, v. The Department of Revenue, Appellee.

Mr. JUSTICE HERSHEY delivered the opinion of the court:

Plaintiff, Marshall & Huschart Machinery Co., appeals from a judgment of the circuit court of Cook County affirming an assessment of a retailers occupation tax deficiency. Plaintiff had protested pursuant to receipt of a notice of proposed assessment of such deficiency, and had a hearing before the Department of Revenue. Final assessment was entered upon the conclusion of such hearing, and appeal was taken to the circuit court which af-

firmed the assessment. The revenue being involved, the cause comes directly to this court on appeal.

Plaintiffs, prior to 1946, bought machine tools from manufacturers and resold them to users in this State. In order to compete with out-of-State sellers, who were not subject to the Illinois retailers' occupation tax, the plaintiff revised its operation. It proposed to enter into amendments of its exclusive representation agreements held with its manufacturers, to become a limited agent only for these out-of-State manufacturers, with authority only to solicit orders from Illinois customers and to forward same to the out-of-State manufacturers for acceptance at their places of business. The machines were then to be manufactured and shipped into Illinois directly to the customer f.o.b. the out-of-State factory. The out-of-State manufacturer, as principal, was then to send its invoices to plaintiff at the retail price, less the commission payable to plaintiff, and plaintiff was to invoice the customer at full list price.

This plan was presented to the Department of Revenue with a request for a ruling as to the liability of plaintiff, under such plan, for retailers' occupation tax, and the liability of the out-of-State principal for the same. The Department ruled that it appeared that plaintiff would be solely an agent and that a *bona fide* agent who acts for a disclosed principal is not, itself, engaged in *selling* at retail, and the out-of-State principal, as the seller, is not subject to the tax, provided the situation is as proposed and represented.

Thereupon plaintiff amended its exclusive representation agreements, engaged in solicitation, *etc.*, as proposed, and purchased the accounts receivable of the out-of-State manufacturers thus generated, without recourse.

On March 20, 1951, the Department advised the plaintiff that it would no longer be bound by the previous

ruling, but would examine each company's method of doing business in all pertinent respects when the question of agency arises from a sale, or whether the company is an independent distributor buying for resale.

The plaintiff continued to pursue its same outlined procedures. The Department subsequently instructed an auditor to audit the books and records of plaintiff from April 1, 1951, to June 30, 1954. Upon completion of the audit, a notice of proposed assessment was issued by the Department and delivered to plaintiff. Plaintiff filed its protest and the various hearings and appeals followed.

Plaintiff urges (1) that it is only an agent soliciting orders for out-of-State manufacturers and is not engaged in selling tangible personal property at retail, (2) that the transactions were interstate sales expressly exempt from the Retailers' Occupation Tax Act by section 2 thereof, and (3) that its motion to dismiss at the close of the Department's case should have been sustained.

Plaintiff insists that the Department of Revenue did not make a *prima facie* case to support its notice of proposed assessment, and that error resulted from the failure of the hearing officer to sustain plaintiff's motion to dismiss at the close of the Department's case. Section 4 of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1957, chap. 120, par. 443) provides that the Department shall examine a taxpayer's return, correct it according to its best judgment and information, and such corrected return shall be *prima facie* evidence of the correctness of the amount of tax due.

The Department in this case, contrary to the procedures followed in the cases cited to us by plaintiff (*Goldfarb* v. *Department of Revenue*, 411 Ill. 573; *Miller* v. *Department of Revenue*, 408 Ill. 574; *Novicki* v. *Department of Finance*, 373 Ill. 342,) accepted the books and records of the plaintiff as true and correct, but disagreed as to the

taxability of various transactions. No unreal, arbitrary, or artificial markup or determination of taxable receipts was adopted by the Department auditor.

In this case the auditor only examined the recorded transactions and drew a determination of taxability or nontaxability from plaintiff's records of each sale. The Department corrected plaintiff's return as directed by statute. That return as corrected, the audit of plaintiff's books and records, and the auditor's testimony constituted a *prima facie* case. (*Goldfarb* v. *Dept. of Revenue*, 411 Ill. 573.) The auditor's opinion or considerations in regard to the ruling, withdrawal, and so-called limited agency agreements, could not and did not vary the establishment of a *prima facie* case by the Department. The Department met its burden, and its assessment was not subject to dismissal at the close of the Department's case. The hearing officer did not err in overruling the motion of plaintiff, and in requiring plaintiff to proceed in its effort to overcome that case.

Plaintiff insists that it is a limited agent for out-of-State manufacturers, and only solicits orders which are accepted outside the State of Illinois. Hence it argues that it is not engaged in the business of selling tangible personal property, and that all sales were interstate, rendering both plaintiff and the sale not subject to the application of the Retailers' Occupation Tax Act. Section 2 of that act (Ill. Rev. Stat. 1957, chap. 120, par. 441,) imposes a tax upon the business of selling tangible personal property at retail at the rate of two per cent of the gross receipts of such sales after June 30, 1941. The tax is not imposed, however, upon the privilege of engaging in interstate commerce.

It is clear that prior to the year 1946, the plaintiff purchased machines from out-of-State manufacturers and re-

sold them within this State to Illinois users, and that plaintiff was thus engaged in selling tangible personal property at retail within Illinois. Pursuant to the plan devised and submitted to the Department, plaintiff amended and re-executed its exclusive representation agreements with its out-of-State manufacturers, by insertion of language purporting to make it a limited agent with authority only to solicit orders from Illinois customers. The orders, thereafter, were accepted out-of-State and shipped directly to the customer. The mere solicitation of orders only in this State has been found not to subject the seller to the retailers occupation tax, where the seller is an out-of-State resident and the goods are shipped from out-of-State. There the interstate commerce clause applies to bar the application of the tax. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534, 95 L. ed. 517; *McCleod* v. *Dilworth Co.*, 322 U.S. 327, 88 L. ed. 1304; *Automatic Voting Machine Corp.* v. *Daley*, 409 Ill. 438; *Allis-Chalmers Manufacturing Co.* v. *Wright*, 383 Ill. 363.

However, plaintiff's plan provided that the out-of-State manufacturer should invoice plaintiff at the retail price of the machine, less commission payable to plaintiff, and plaintiff should invoice the customer for full list price. Plaintiff's operation went a step further—in all of these transactions, plaintiff purchased the account receivable from the out-of-State manufacturer or supplier, without recourse. The transactions, except in the matter of form, are little different from those occurring before 1946. Plaintiff by contract language has called itself a limited agent and purports to have only the power to solicit orders. The orders are technically marked accepted out-of-the-State, but the orders solicited by plaintiff are not refused. The customers are not merely billed through

plaintiff but plaintiff actually purchases the account receivable and in turn bills the Illinois user. The only real difference which now occurs is that all orders are sent directly from the manufacturer to the Illinois customer. It clearly appears that the transaction is the same as those prior to 1946. Plaintiff has merely created a fiction or subterfuge in an effort to transmute a strictly intrastate transaction into an interstate sale in order to evade the application of the Illinois tax. Plaintiff continues to enjoy all of the profits of an intrastate sale, and all of the advantages of selling tangible personal property at retail, but claims it has avoided the application of the Illinois tax placed upon its occupation. The only purpose of this complicated procedure was to escape taxation, without loss of the privileges and profits theretofore enjoyed. [The mere amendment of the agreements of plaintiff and the out-of-State manufacturers, without an actual change of business operation, could not convert a purely local business into an interstate commerce business, protected by the commerce clause.] (*Superior Oil Co.* v. *State of Mississippi ex rel. Knox*, 280 U.S. 390, 74 L. ed. 504). Plaintiff did not, after 1946, merely solicit for the out-of-State concerns, but it continued to conduct the same business it had previously enjoyed. Plaintiff continued to sell to Illinois users, and the out-of-State manufacturers merely supplied the needs of plaintiff. The sales were all made upon plaintiff's credit, to and for plaintiff's business.

Plaintiff was engaged in selling at retail within this State, and the sales by plaintiff to Illinois users were not interstate transactions. The circuit court of Cook County correctly upheld the Department's finding of taxability, and its judgment is affirmed.

Judgment affirmed.

APPENDIX C.

(Seal)

State Of Illinois

Office Of
CLERK OF THE SUPREME COURT
Springfield

Mrs. Earle Benjamin Searey
Clerk

Telephone
8-6435

March 28, 1960

Messrs. Dixon, Morse,
Knouff, Potter & Holmes
Attorneys at Law
First National Bank Bldg.
Chicago 3, Illinois

Gentlemen:

In Supreme Court today, in Case No. 35413 entitled:

Marshall & Huschart Machinery Co., an Illinois corporation, appellant

vs.

Department of Revenue, State of Illinois, appellee

Petition for Rehearing was: DENIED.

Very truly yours,
Mrs. Earle Benjamin Searey
Clerk of the Supreme Court

APPENDIX D.

State of Illinois }
County of Cook } ss.

IN THE CIRCUIT COURT OF SAID COUNTY

MARSHALL & HUSCHART MACHINERY CO., an Illinois corporation,
Plaintiff,
v.
DEPARTMENT OF REVENUE, STATE OF ILLINOIS,
Defendant.
No. 57 C 2347

COMPLAINT TO REVIEW FINAL DETERMINATION OF THE DEPARTMENT OF REVENUE UNDER THE RETAILERS OCCUPATION TAX ACT.

Now comes Marshall & Huschart Machinery Co., an Illinois corporation, plaintiff, by Dixon, Morse, Knouff, Potter & Holmes, its attorneys, and represents to the court as follows:

This complaint is filed by the plaintiff pursuant to the provisions of the Administrative Review Act (Secs. 264-279, inclusive, Chapter 110 Illinois Revised Statutes), to review the record and the determination of the defendant herein, the Department of Revenue of the State of Illinois, in its final assessment of a retailers' occupation tax deficiency of $162,051.20, plus a 10% penalty of $16,205.12, or a total claimed deficiency of $178,256.32. Said final assessment is dated January 10, 1957 and was received by this plaintiff by registered mail on January 15, 1957.

Plaintiff alleges:

Plaintiff's Retailers' Occupation Tax Registration number is 439928.

1. On August 30, 1946 plaintiff, through its attorneys, requested a Ruling from the defendant Department of Revenue with respect to liability for Illinois Retailers' Occupation Tax on certain interstate transactions outlined and described in its said request for such Ruling. A description of the transactions with respect to which such Ruling was requested is detailed in the Ruling of the Department subsequently issued pursuant to such request.

2. On September 27, 1946 the said defendant Department of Revenue over the signature of Mr. Willard Ice, Rules and Regulations Division, issued its Ruling that the transactions described in the plaintiff's aforesaid Request for a Ruling constituted transactions in interstate commerce with respect to which retailers' occupation tax liability is not incurred. Specifically the Department of Revenue's Ruling was that the plaintiff herein was "acting solely as an agent for" an out-of-state manufacturer; that "retailers' occupation tax liability is not incurred by a *bona fide* agent who acts for a disclosed principal, as such agent is not, itself, engaged in the business of selling tangible personal property at retail in this State"; that "Under the facts as submitted, . . . the (named company, *i.e.*, the principal) does not incur retailers' occupation tax liability in this type of case because the transaction comes within the terms of paragraph 3(c) of subdivision III of Article 5 of the Rules and Regulations". A copy of this Ruling is attached hereto as Exhibit "A" and is specifically made a part hereof by reference. Said Ruling is also incor-

porated in the record of the hearing before the Department of Revenue to be reviewed in this proceeding.

3. On March 20, 1951 the then acting Director of Revenue of the State of Illinois advised the attorneys for this plaintiff "that the Department will no longer be bound by the letter ruling of September 27, 1946, but will examine each company's method of doing business in all respects that may be pertinent when a question arises as to whether that company is merely an agent or whether it is an independent distributor, buying for resale." Further, that "where an audit . . . discloses that a particular machinery dealer has failed in some respect to comply strictly with the conditions which were recognized by the Department's letter of September 27, 1946, as constituting an agency, the protection of that letter cannot be claimed by that machinery dealer, and the Department will feel free to make an independent determination of that dealer's taxability or nontaxability under the Retailers' Occupation Tax Act". Exhibit "B" hereto.

4. That subsequent thereto, the defendant Department of Revenue authorized and directed one of its Field Auditors, Louis Klingman, to make an audit of the books and records of this plaintiff for the period from April 1, 1951 through June 30, 1953. Plaintiff alleges that the record of the hearing on this matter before the Department of Revenue, to be reviewed by this court, shows that the said auditor for the Department failed and refused to examine each of the transactions which he listed in his so-called audit report as being subject to tax under the Retailers' Occupation Tax Act, and that no audit of said transactions was therefore made by such Field Auditor on behalf of the defendant Department of Revenue.

5. Plaintiff further alleges that each of the transactions listed in said audit report and sought by the Department of Revenue to be subject to retailers' occupation tax liability pursuant to its Notice of Final Assessment served upon the taxpayer as aforesaid, is in fact and in law, as shown by the record of the hearing before the Department, an interstate transaction exempt from liability for retailers' occupation tax, and is recognized as such by the aforesaid provisions of paragraph 3(c) of subdivision III of Article 5 of the Department's Rules and Regulations, referred to by the Department in its aforesaid Ruling and quoted, in part, in paragraph 2 above; and that the defendant Department's attempted taxation of these transactions is in violation of Section 2, Article 2 of the Constitution of the State of Illinois, and of the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States of America.

6. That the record of the hearing before the Department of Revenue, to be reviewed herein, shows upon its face that the Department of Revenue (record page 50 and following) "originally served a Notice of Proposed Assessment under date of March 9, 1954 in which it allegedly proposed to assess an additional retailers' occupation tax for $71,288.50, and a 10% penalty of $7,128.85, or a total of $78,417.35"; that such Notice of Proposed Assessment was originally served on this plaintiff by prior arrangement with the plaintiff as to the manner and method by which tax liability for the period in question herein should be determined; that thereafter, a hearing was commenced, after protest and request for hearing by this plaintiff, on such Notice of Proposed Assessment; that subsequent to the commencement of such hearing and after the taking of evidence had been commenced therein, the defendant Department of Rev-

enue arbitrarily and without any consultation whatsoever with the plaintiff, served "a second and different Notice of Proposed Assessment" (record page 51, *et seq.*), and started a hearing all over again on such second Notice of Proposed Assessment for a different and greater period than that declared in the first Notice of Proposed Assessment; that the defendant Department had no right or authority so to do, and the Department has thereby attempted to deprive this plaintiff of its property, *i.e.*, to assess and compel the payment of a liability for retailers' occupation tax against this plaintiff without due process of law.

7. That Section 4 of the Retailers' Occupation Tax Act, being Section 443, Chapter 120, 1953 Illinois Revised Statutes, and the other related sections of that Act, and the entire Act itself, is and are unconstitutional in that they are in violation of Section 2 of Article 2 of the Constitution of the State of Illinois and of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States of America, in that they deprive the plaintiff of its property without due process of law by compelling the plaintiff to incur a penalty of 10% of the amount of tax which the said defendant Department of Revenue claims to be due under its Notice of Proposed Assessment, said Notice of Proposed Assessment being not in fact or in law an assessment of a tax which is final or complete or an adjudication against the taxpayer prior to the completion of hearings requested by the taxpayer subsequent to the receipt of such Notice of Proposed Assessment; that the taxpayer is thus deprived of its property without due process of law, guaranteed by the above cited sections of the Constitutions of the State of Illinois and of the United States of America, in that it is forced to

suffer and incur and pay a penalty of 10% of the amount proposed to be assessed by the Department of Revenue for the purpose of coming before the Department in a hearing and defending itself against the Department's Notice of Proposed Assessment; that the corresponding provisions of the Illinois Retailers' Occupation Tax Act above cited, which give the plaintiff its only other alternative—that of paying the tax to avoid such penalty, without any opportunity whatsoever to defend itself in a hearing to be held for such purpose without the incurrence of such penalty—likewise deprives the plaintiff of its property without due process in that it compels the plaintiff to pay over its money to the Department of Revenue, in advance of any hearing, to determine the amount or validity of any such proposed assessment of tax, and thus deprives the taxpayer of the use of that money until it is able to recover it in an action at law under the applicable provisions of the aforesaid Retailers' Occupation Tax Act.

8. That the plaintiff is likewise deprived of its property without due process of law, guaranteed to it under the provisions of the above cited sections of the Constitutions of the State of Illinois and of the United States of America, by the above cited provisions of the said Retailers' Occupation Tax Act providing for a hearing to be conducted by an employee, a so-called "hearing officer" of the Department of Revenue; that such hearing officer is under the direction and control of the Department of Revenue, which had already theretofore determined that it would assess a tax against the plaintiff; that such hearing officer acts not only as a judicial officer pretending to sit in judgment upon the taxpayer and the Department of Revenue, but also as the prosecutor who consults with, counsels and advises, and con-

ducts the direct examination of the Department's witnesses in such hearings; and that such hearing officer is not free to, and cannot, exercise a free and impartial judgment on the question of the liability of the plaintiff for the tax already determined to be assessed against the plaintiff by the Department of Revenue.

9. That the plaintiff, within the time prescribed by the aforesaid Retailers' Occupation Tax Act, following receipt of the above stated separate Notices of Proposed Assessment under said Act, filed its protest against the issuance of such proposed assessment and duly requested a hearing thereon.

10. That thereafter, the plaintiff appeared and interposed its aforesaid objections to such proposed assessments and offered evidence which clearly shows on the face of the record of said hearings before the Department to be reviewed herein that the transactions in question were interstate transactions not subject to tax under the Retailers' Occupation Tax Act, and were recognized as such by the Department of Revenue in its aforesaid Ruling, and that said Retailers' Occupation Tax Act and the proceedings conducted by the Department of Revenue pursuant thereto deprived the taxpayer of its property without due process as above alleged.

Wherefore, for the reasons above stated and for other reasons to be advanced upon the hearing hereof, plaintiff prays that summons may be issued in this action to review the record of the proceedings held in this matter before the Department of Revenue of the State of Illinois as aforesaid, and requiring the defendant the Department of Revenue to file its answer herein consisting of a record of the entire proceedings had before it, including a record of the proceedings initially had pursuant

to plaintiff's aforesaid protest and request for hearing on the Department's original Notice of Proposed Assessment dated March 9, 1954 for the period from April 1, 1951 through March 31, 1952, claiming retailers' occupation tax deficiencies in the sum of $71,288.50 plus a 10% penalty in the amount of $7,128.85, or a total of $78,417.35, and also the record of the proceedings pursuant to the Department's second Notice of Proposed Assessment dated August 6, 1953, upon which a hearing was also held pursuant to plaintiff's protest and request for hearing, for the period from April 1, 1951 through June 30, 1953, claiming tax liabilities and penalties due the Department of Revenue in the sum of $178,256.32; and that a judgment or decree may be entered herein reversing and nullifying the action of the Department of Revenue in attempting to assess a retailers' occupation tax liability against this plaintiff in the sum of $162,051.20 and a 10% penalty thereon in the sum of $16,205.12, or a total assessment of $178,256.32.

Marshall & Huschart Machinery Co., Plaintiff,
By: Dixon, Morse, Knouff, Potter & Holmes
Attorneys for Plaintiff

Dixon, Morse, Knouff, Potter & Holmes
First National Bank Bldg., Suite 1232
Chicago 3, Illinois
RAndolph 6-1660

EXHIBIT "A"

State of Illinois
Dwight H. Green, Governor

DEPARTMENT OF REVENUE
Springfield

Paul C. Rosenquist, Director — Rules and Regulations Division

September 27, 1946

Holmes, Dixon, Scott & Knouff,
Attorneys at Law,
208 South LaSalle Street,
Chicago 4, Illinois.

Attention: Mr. Lorentz B. Knouff.

Gentlemen:

This is to acknowledge receipt of your letter of September 25, 1946. Your letter of August 30, 1946, reads in part as follows:

"We write to request a ruling from the Department of Revenue with respect to liability of our client, Marshall & Huschart Machinery Co., an Illinois corporation, for Illinois Retailers' Occupational Tax under the circumstances set forth below, and also whether a principal located outside the state of Illinois for which our client acts as agent may be subject to the tax under said facts. Our client is not to be confused with another corporation, The Marshall and Huschart Machinery Company, concerning which an opinion has previously been requested and given by the Department. The last-named corporation is now in process of dissolution, and the client with respect to which this opinion is requested, is a new corporation which has purchased the name and good-will of the old company.

"(1) The client is an Illinois corporation engaged in the sale of machine tools within the state of Illinois and elsewhere.

"(2) The client represents within the state of Illinois, manufacturers of machine tools located outside the state of Illinois under contracts with such manufacturers which establish the relation of principal and agent and which provide that Marshall & Huschart Machinery Co., with respect to sales within the state of Illinois, shall have no power to bind the principal (the machine tool manufacturer) to contracts, Marshall & Huschart Machinery Co. acting merely as agents to solicit orders within the state of Illinois and to transmit them to its principal for acceptance. A sample clause incorporated in the contract of Marshall & Huschart Machinery Co. as agent, with its various principals, is as set forth in Exhibit 'A' hereto attached.

"(3) Marshall & Huschart Machinery Co., by its duly authorized representatives, solicits and receives an offer of purchase from its customer located within the state of Illinois. This offer is incorporated in purchase order form, sample copy of which is attached and marked 'Exhibit B', addressed to the principal, c/o Marshall & Huschart Machinery Co., agent, with the following clause appended to the form:

> 'This offer shall not be binding upon either party until accepted by (principal's name) at its home office in (location outside State of Illinois).'

"(4) Marshall & Huschart Machinery Co. receives the purchase order from the customer and forwards same to its principal outside the state of Illinois for acceptance, together with copy of said

purchase order as authorization to invoice Marshall & Huschart Machinery Co.

"(5) Principal outside state of Illinois accepts purchase order by writing or stamping name of duly authorized officer after word 'Accepted' appearing on the form or on the face of the order, and acknowledges by returning copy of order as accepted to Marshall & Huschart Machinery Co. as per Exhibit 'C' attached.

"(6) Principal located outside the state of Illinois, ships machine from outside the state direct to customer in Illinois, f.o.b. point of shipment outside state of Illinois, with Bill of Lading direct to customer and copy of Bill of Lading forwarded to Marshall & Huschart Machinery Co. for its file.

"(7) Principal outside state of Illinois invoices Marshall & Huschart Machinery Co. as agent at retail price of machine less commission payable to Marshall & Huschart Machinery Co. Sample copy of invoice is attached and marked 'Exhibit D'.

"(8) Marshall & Huschart Machinery Co. as agent for principal located outside the state of Illinois, invoices customer located within the state of Illinois at retail price. Sample copy of invoice is attached and marked 'Exhibit E'."

The contractual provision, referred to in your letter and evidenced by Exhibit "A", reads as follows:

"All solicitation and taking of orders for the purchase of machine tools, machinery and equipment within the State of Illinois shall be made by Marshall & Huschart Machinery Co. for and on behalf of and as agent for (the principal), and Marshall &

Huschart Machinery Co. shall have no power to bind (the principal) to any contract for the sale of any machine tools, machinery or equipment within the State of Illinois, but all orders for the sale of machine tools, machinery and equipment shall be forwarded by Marshall & Huschart Machinery Co. to (the principal) for acceptance by its duly authorized officer at its home office at (place of address)."

An examination of Exhibits "B & C", submitted with your letter of August 30, 1946, confirms the statements which you make about these exhibits in that letter. The sample invoice from Lodge & Shipley Machine Tool Company to Marshall & Huschart Machinery Company, agent, which sample invoice you identify as Exhibit "D", contained a statement about which we raised some question in our letter of September 24, 1946. This statement reads:

"Sold Marshall & Huschart Machinery Co. Agent"
To

With your present letter, you have sent a revised Exhibit "D" (sample invoice from the alleged principal to the alleged agent), and you say that this is the real invoice which will be used. In the revised invoice, you have corrected the statement in question to read as follows:

"Billed Marshall & Huschart Machinery Co., Agent"
To

This sample invoice also contains the following statement:

"Purchased by Caterpillar Tractor Co. Peoria, Illinois from The Lodge & Shipley Machine Tool Co. Cincinnati, Ohio."

Your sample invoice, marked Exhibit "E", is a billing by Marshall & Huschart Machinery Company to the pur-

chaser showing shipment made to the purchaser, f.o.b. Cincinnati, Ohio, and this invoice states:

> "Sold by The Lodge & Shipley Machine Tool Co., Cincinnati, Ohio, to Caterpillar Tractor Co., Peoria, Illinois."

From the above facts, it appears that Marshall & Huschart Machinery Company will be acting solely as an agent for the Lodge & Shipley Machine Tool Company of Cincinnati, Ohio, in the type of transaction under discussion. Retailers' Occupation Tax liability is not incurred by a *bona fide* agent who acts for a disclosed principal, as such agent is not, itself, engaged in the business of selling tangible personal property at retail in this State. A person who is engaged in such business in such a case (if anyone is engaged in such business) is the principal. However, under the facts as submitted, and as set out hereinabove, the Lodge & Shipley Machine Tool Company does not incur Retailers' Occupation Tax liability in this type of case because the transaction comes within the terms of paragraph 3(c) of subdivision III of Article 5 of the Rules and Regulations, a copy of which is enclosed. We wish to point out that this ruling is limited to the type of fact situation which is outlined hereinabove and should not be applied to fact situations which do not conform to the type upon which the ruling is based. We are, of course, assuming that the business in question will be conducted in the manner represented to us and discussed in this letter, as this ruling will not apply if a deviation from that method of doing business occurs.

Yours respectfully,
DEPARTMENT OF REVENUE

Willard Ice
Rules and Regulations Division
WI:A
Enc.

EXHIBIT "B"

C. E. Halpin
Executive Officer

STATE OF ILLINOIS
Department of Revenue
Springfield
Richard J. Daley
Director
Ernest C. Marohn
Assistant Director

March 20, 1951

Holmes, Dixon, Scott & Knouff
Attorneys at Law
208 South LaSalle Street
Chicago 4, Illinois

Attention: Mr. Lorentz B. Knouff
Re: Marshall & Huschart Machinery Company

Gentlemen:

In a letter dated September 27, 1946, to you from the Department relative to the above named company, you were advised that the Department would regard certain formal methods of order-taking, billing and contracting as being sufficient to establish that Marshall & Huschart Machinery Company acted merely as agent for certain out-of-State manufacturers.

This is to advise you that the Department will no longer be bound by the letter ruling of September 27, 1946, but will examine each company's method of doing business in all respects that may be pertinent when a question arises as to whether that company is merely an agent or whether it is an independent distributor, buying

for resale. The new policy just stated will be effective as to contracts of sale made by machinery dealers on or after April 1, 1951. However, where an audit or other investigation discloses that a particular machinery dealer has failed in some respect to comply strictly with the conditions which were recognized by the Department's letter of September 27, 1946, as constituting an agency, the protection of that letter cannot be claimed by that machinery dealer, and the Department will feel free to make an independent determination of that dealer's taxability or non-taxability under the Retailers' Occupation Tax Act and to proceed accordingly in the matter of assessing the dealer for unpaid retailers' occupation tax for any period prior to April 1, 1951, not barred by the Statute of Limitations, as well as for any period beginning on or after April 1, 1951.

Very truly yours,
Acting Director of Revenue

APPENDIX E

State of Illinois }
County of Cook } ss.

IN THE CIRCUIT COURT OF COOK COUNTY

MARSHALL & HUSCHART MACHINERY CO., an Illinois Corporation,
Plaintiff

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS
Defendant

Administrative Review No. 57C 2347

ORDER

This cause having been duly reached for trial upon the regular calendar of this Court, and coming on to be heard upon the plaintiff's complaint, brought under the Illinois Administrative Review Act, and upon the answer of the defendant thereto, consisting of a duly authenticated transcript of the record of the proceedings had before the Department of Revenue of Illinois, sought to be reviewed by the plaintiff herein; and, the plaintiff, appearing in person and by its attorney, and the defendant by Latham Castle, Attorney General of the State of Illinois, its attorney; and the latter answering ready for trial, the Court having duly considered the same and being now fully advised in the premises, Finds that it has jurisdiction of the parties hereto and the subject hereof; and

Does Hereby Order, Adjudge And Decree, that (First) the plaintiff's complaint for relief herein be denied and that the action of the Department of Revenue of Illinois reviewed herein, be and the same is hereby affirmed; and that (Second) a judgment be, and the same is hereby entered in favor of the Department of Revenue of the State of Illinois for the use of the People of the State of Illinois and against the plaintiff Marshall & Huschart Machinery Co., an Illinois corporation, in the sum of One Hundred Seventy-Eight Thousand, Two Hundred Fifty-Six and 32/100 ($178,256.32) Dollars together with costs, and that execution issue thereof.

Enter: /s/ William V. Brothers
Judge

Dated: April 6, 1959.

APPENDIX F.

PETITION FOR REHEARING.

Plaintiff and Appellant, Marshall & Huschart Machinery Co., respectfully request a rehearing and that the opinion of the court filed on January 22, 1960 may be revised, and judgment reversed, for the following reasons:

The opinion has overlooked and misapprehended the record, the admissions of the Department of Revenue in its brief in this court, the requirements for a sale to be subject to the Retailers' Occupation Tax under the statute, the ruling of the Department of Revenue of March 20, 1951, and the nature and character of the transactions involved.

I.

We pointed out in our Brief:

a) The record in this case is undisputed that plaintiff is only a limited agent of each out-of-state manufacturer, whose sole authority was to solicit orders for and on behalf of its principal (Abs. 59, 61, 65, 66, 67, 177, 187, 188, 189, 197, 199, 211, 224, 231, 246 and 247—Brief 5, 7, 8).

b) No single instance was found by the auditor for the Department of Revenue in which the plaintiff accepted, or attempted to accept, any order from an Illinois customer for the machinery of any such out-of-state manufacturer (Brief 9).

c) Plaintiff complied strictly with the terms of its limited agency authority, and confined itself to the solicitation of orders from Illinois customers for its out-of-state

principals (Abs. 59, 82, 85, 86, 170, 171, 177, 189, 190—Brief 8).

d) The out-of-state factories, in every instance, accepted such orders at their out-of-state place of business, fabricated the machines there, and shipped the machines direct to the Illinois customer. f.o.b. out-of-state factory (Abs. 61, 63, 216, 219, 225 and 245—Brief 9).

The record is, therefore, that each of these transactions constituted an interstate sale by the manufacturer to the Illinois customer.

We pointed out in our brief (p. 13) that plaintiff never received title from the seller, nor passed title to the buyer; that the Retailers' Occupation Tax Act provides that a sale at retail, to be subject to the tax, "*necessarily involves the passage of title from the seller to the buyer.*"

We point out that there is no basis in the record, therefore, upon which to sustain any liability of the plaintiff for this tax.

The record, the Department's admission in its brief, and this court's opinion shows and finds that the account receivable thereby generated between the out-of-state manufacturer and its Illinois customer, was purchased by the plaintiff (Abs. 63, 115, 194, 220—Dept. Brief 2—Opinion 1, 2, 4).

The foregoing further demonstrates that the record, the admissions of the Department itself, and the opinion all show that these are interstate sales, made by out-of-state manufacturers. The record shows, and the Department admits, that these accounts receivable are from the Illinois customer to the out-of-state manufacturer, and that the manufacturer, therefore, not the plaintiff, made the sales—that it was the account receivable *generated by*

the sale that plaintiff bought. We pointed out in our brief (13, 14—Reply Brief 2) that the tax, where applicable, is on a sale—not on the purchase and collection of an account receivable.

We respectfully point out that the opinion, if let stand, makes the solicitation of orders, without authority to accept, and the purchase and collection of accounts receivable, subject to the Retailers' Occupation Tax—despite the fact that the party taxed did not receive or pass title to the buyer, and was not under any theory of law stated or unstated in the opinion the seller of the goods. The Department has never claimed, in its brief or in its argument, that plaintiff made these sales. It does not state, and has not argued, any legal theory or basis for plaintiff's liability for the tax.

We call your attention further to the fact that the Department admits in its brief (p. 8) that a taxpayer has a right to conduct his business in such fashion as to minimize or escape liability for a tax if such method of doing business is open to him. We further call your attention to the fact that the statute does not prohibit a person, either on his own accord or when forced to do so by an out-of-state supplier of goods, from changing his method of doing business. The opinion concedes (p. 3) that mere solicitation of orders only in this state has been found not to subject the seller to the Retailers' Occupation Tax, where the seller is an out-of-state resident and the goods are shipped from out-of-state. We respectfully direct your attention to the fact that the opinion, on page 4, necessarily holds, however, that the plaintiff's solicitation of orders for out-of-state manufacturers, and its subsequent purchase and collection of accounts receivable, after the foreign manufac-

turer makes the sale, somehow ties plaintiff in to the sale and makes it taxable to the plaintiff.

We further respectfully point out that the opinion is incorrect in stating that the plaintiff planned the change in its method of doing business; that the change was the "plaintiff's plan" (Opinion p. 4). We pointed out in our Reply Brief (p. 2) that the record shows plaintiff had no freedom of choice as to the manner and method by which it might have chosen to conduct its business. That plaintiff was not permitted to purchase goods from these out-of-state sellers and resell to Illinois customers. And that it was limited to the solicitation of orders by its out-of-state principals, who reserved to themselves the right to make interstate sales to their Illinois customers. We also pointed out in our original brief (p. 5) that the record shows that competition from out-of-state sellers of machine tools to Illinois customers, who were not subject to the tax, had forced the factories whom plaintiff represented in Illinois to adopt a new method of sales for their machine tools which would avoid the incidence of the tax. And that it was therefore determined that plaintiff should act as a limited agent only for the solicitation of orders, with no authority to purchase and resell from them to Illinois customers.

It is respectfully urged, therefore, that the opinion errs in holding:

1. That plaintiff, a strictly limited agent for an out-of-state seller, is liable for Illinois Retailers' Occupation Tax on these out-of-state manufacturers' interstate sales.

2. That purchase of accounts receivable generated by such interstate sales, subsequent to the consummation of the sale itself, and the collection of those accounts, constitute intrastate sales of the goods involved, subject to the tax.

3. That the statement in the opinion that the 'enjoyment' of the same benefits resulting to plaintiff from the change of the out-of-state factories' method of transacting business with Illinois customers, as it previously enjoyed when it bought from these out-of-state factories and resold, make it subject to and liable for the Illinois tax. We respectfully point out that the statute does not require plaintiff to forego any such benefits as a condition precedent to, acceding to, and participating in, the right of out-of-state factories to so limit plaintiff's activities within the state as to avoid the Illinois tax on those factories' sales. That the 'benefits' accruing to plaintiff are not the test of taxability—but whether plaintiff made the sales. We point out that the record, the Department's admissions, and the opinion all demonstrate that it did not.

4. That the Illinois Retailers' Occupation Tax Act penalizes an Illinois citizen for acting as a limited agent only to solicit orders from Illinois customers for an out-of-state factory and for buying and collecting accounts receivable generated from interstate sales made by such manufacturer, because that agent had been formerly, but was no longer, free to buy such goods and resell them to Illinois customers. The opinion errs, in holding, that no Illinois resident, having once bought and resold out-of-state merchandise, is free to subsequently act only as such limited agent without continuing to incur liability for the intrastate tax. And in holding that the subsequent purchase and collection of the account receivable generated by the interstate sale, after it has been made, imposes liability for the tax, even though the imposition of the tax is limited by the statute itself to cases where such person sells and passes title to the goods involved. No sale or passage of title by plaintiff is disclosed by the record.

For the above reasons, the opinion, and the judgment it affirms, deprives plaintiff of its property without due

process of law; denies plaintiff the equal protection of the laws, and imposes a tax on interstate commerce, by subjecting plaintiff to the Illinois Retailers' Occupation Tax for activities which do not constitute a sale by plaintiff, and do not even involve the passage of title by the plaintiff to the buyer, as required by that Act, contrary to and in violation of the Fifth Amendment and of the Fourteenth Amendment to the Constitution of the United States of America, and of Section 2 of Article II of the Constitution of the State of Illinois, and of Section 8, Article I of the Constitution of the United States of America.

II.

The opinion, in addition, misconstrues the Department of Revenue letter of March 20, 1951 (Opinion 2). The record (Abs. 70) shows that letter *confirmed the same procedure outlined in the Department's 1946 ruling as constituting transactions not subject to the tax,* (1) because plaintiff was only an agent and not the seller and (2) because the sale was in interstate commerce. The 1951 letter confirms and endorses the Department's 1946 ruling by advising plaintiff (Br. 10):

> ". . .; that where an audit or other investigation discloses that a particular machinery dealer *has failed in some respect to comply strictly with the conditions recognized by the Department's Ruling of September 27, 1946, as constituting an agency,* the protection of that letter cannot be claimed . . ."

The record shows (Br. 5 to 11, incl.) and the Department concedes (Dept. Br. 1) and the opinion states (p. 2), "The plaintiff continued to pursue its same outlined procedures."

The plaintiff is therefore entitled to claim, and receive from this court, "the protection of that letter," which shows and holds that continued pursuit of the same procedures outlined in the 1946 Ruling makes the tax inapplicable to the Plaintiff. The record is, and the opinion finds, that is all we have done.

We respectfully submit that the record in this case, the briefs, and the Department's own Rulings in 1946 and 1951, as well as the correct statements above referred to in the opinion, and the correction of those statements therein, which, as above pointed out, misapprehend and misconstrue the record require a reconsideration of the merits of this case on rehearing and an opinion and order reversing the judgment below.

Respectfully submitted,

FRED W. POTTER,
Attorney for Plaintiff-Appellant.

DIXON, MORSE, KNOUFF, POTTER & HOLMES,
38 South Dearborn Street,
Chicago 3, Illinois,
RAndolph 6-1660.

APPENDIX G.

Series E No. 361

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
RETAILERS' OCCUPATION TAX DIVISION
160 No. LaSalle Street, CHICAGO 1, ILL. — State Office Building, SPRINGFIELD, ILL.

REGISTRATION NUMBER A39928
DATE OF ISSUE 1-10-57
P. A. CODE 16-1-212-18-3-B B4072

FINAL ASSESSMENT

Marshall & Huschart Machinery Company
571 West Washington Street
Chicago 6, Illinois

Copy to Attys: Holmes, Dixon, Knouff & Potter, 208 S. LaSalle Chicago, Ill.

A hearing has been held in accordance with the provisions of the Retailers' Occupation Tax Act ☒ and the Municipal Retailers' Occupation Tax Act ☐ and the Use Tax Act ☐ pursuant to protest to the Department's Notice of Proposed Assessment(s) to or against the above taxpayer and request for such hearing thereon. In accordance with the provisions of the aforesaid Act(s), the Department of Revenue hereby issues its FINAL ASSESSMENT(S) to or against the above taxpayer for the amounts of the tax and penalty as shown below:

USE TAX (Corrected Returns) Period of:	
Tax Deficiencies	$
% Penalty	$
Total Tax Deficiency and Penalty	$
(Determination of Tax Due) Period of:	
Tax Delinquencies	$
% Penalty	$
Total Tax Delinquency and Penalty	$

MUNICIPAL RETAILERS' OCCUPATION TAX (Corrected Returns) Period of:	
Tax Deficiencies	$
% Penalty	$
Total Tax Deficiency and Penalty	$
(Determination of Tax Due) Period of:	
Tax Delinquencies	$
% Penalty	$
Total Tax Delinquency and Penalty	$

RETAILERS' OCCUPATION TAX Under Section 4 (Corrected Returns) Period of: April 1, 1951 thru June 30, 1953	
Tax Deficiencies	$ 162,051.20
10 % Penalty	16,205.12
Total under Section 4	$ 178,256.32
Under Section 5 (Determination of Tax Due) Period of:	
Tax Delinquencies	$
% Penalty	$
Total under Section 5	$

Total Tax	Total Penalties	Total Assessment
$ 162,051.80	$ 16,205.12	$ 178,256.32

Dated this 10 day of January 19 57

ORIGINAL

THE ABOVE TOTAL AMOUNT IS PAYABLE IMMEDIATELY

DEPARTMENT OF REVENUE
Richard Stevens
As Director of Revenue

RR-121 B—Revised
(7-56—12M—(Note—1-58))